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CHARTERED

August 4, 1997

**VIA HAND DELIVERY**

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

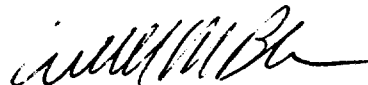
**Re: Petition for Reconsideration and Clarification of Second Report and Order in CC Docket No. 96-149, and Third Report and Order in CC Docket No. 96-61**

Dear Mr. Caton:

RCN Telecom Services, Inc., and Hyperion Telecommunications, Inc., by undersigned counsel, hereby submit their Joint Petition for Reconsideration and Clarification of the Commission's Report and Order in the above-referenced dockets. Pursuant to Section 1.429 of the Commission's Rules, enclosed for filing are an original and eleven (11) copies of this Joint Petition.

Please date-stamp the enclosed extra copy of the Joint Petition and return it to the undersigned via our messenger. If you should have any questions concerning this matter, please do not hesitate to contact me.

Very truly yours,



Russell M. Blau

Counsel for RCN Telecom Services, Inc.  
and Hyperion Telecommunications, Inc.

Enclosures

cc: Joseph Kahl  
Christopher Rozycki  
International Transcription Service

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

100-41217

In the Matter of	)	
	)	
Regulatory Treatment of LEC Provision	)	CC Docket No. 96-149
of Interexchange Services Originating	)	
in the LEC's Local Exchange Area	)	
	)	
and	)	
	)	
Policy and Rules Concerning the	)	CC Docket No. 96-61
Interstate, Interexchange Marketplace	)	

**JOINT PETITION FOR RECONSIDERATION AND CLARIFICATION  
OF RCN TELECOM SERVICES, INC.  
AND HYPERION TELECOMMUNICATIONS, INC.**

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Dated: August 4, 1997

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## EXECUTIVE SUMMARY

The Joint Petition for Reconsideration and Clarification of RCN Telecom Services, Inc. and Hyperion Telecommunications, Inc. can be summarized as follows:

**The Commission Does Not Require the Bell Operating Companies (“BOCs”) to Make Specific**

**Showings of Proof:** The Commission relies upon a speculative and general analysis of market power in declaring the BOCs’ interLATA affiliates nondominant in the provision of in-region, long distance services. Such an analysis should not substitute for a thorough examination of each BOC interLATA affiliate’s ability to improperly exercise market power in a particular region. The Commission should be more cautious in allowing these entities into the interexchange market, as it could upset the competitive balance already present in that market. The Commission should also consider the impact that such improper exercises of market power could have in deterring CLECs and other potential entrants to the long distance market. In light of these concerns, the Commission should require each BOCs and its interLATA affiliate to make an individual demonstration that the BOC interLATA affiliate will not exercise in-region market power in this fashion.

**The Commission Relies Too Much on *Ex Post* Remedies:** The Commission should not rely upon its complaint process and enforcement of the antitrust laws to prevent anticompetitive behavior by BOC interLATA affiliates. Such reliance mistakenly presumes that competitors possess the resources to prosecute such complaints, and that competitors can withstand anticompetitive behavior while awaiting resolution of the complaint. Only preventative measures, such as dominant carrier regulation, will protect true competition in the long distance market.

**The Commission Should Clarify Its Revised Definitions of Relevant Markets:** The Commission should clarify that its revised definitions of relevant markets in fact utilize the *1992 Merger Guidelines* approach. Specifically, the Commission should clarify that its definition of geographic market excludes supply substitutability as a factor for consideration, as is the case in the *1992 Merger Guidelines*.

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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Policy and Rules Concerning the	)	CC Docket No. 96-61
Interstate, Interexchange Marketplace	)	

**JOINT PETITION FOR RECONSIDERATION AND CLARIFICATION  
OF RCN TELECOM SERVICES, INC.  
AND HYPERION TELECOMMUNICATIONS, INC.**

RCN Telecom Services, Inc. ("RCN"), and Hyperion Telecommunications, Inc. ("Hyperion") (collectively, "Joint Petitioners"), by undersigned counsel and pursuant to Section 1.429 of the Federal Communications Commission's ("Commission") rules, hereby petition the Commission to reconsider and clarify certain portions of its Report and Orders released April 18, 1997, in the above-referenced dockets (collectively, "Order").

RCN, through its affiliate, Commonwealth Long Distance Company, provides interexchange long distance services to customers across the nation. Hyperion is a facilities-based competitive local exchange carrier ("CLEC") whose subsidiaries and affiliates are currently operating in or preparing to operate in twelve (12) states. The Joint Petitioners are concerned that the Bell Operating Companies ("BOCs") will be able to capitalize upon the presence of their in-region long distance affiliates to the detriment of competitors in both the long distance and local exchange markets. Specifically, the Joint Commenters fear that an improper exercise of market power by a BOC interLATA affiliate could harm the existing state of competition in the long distance market

and inhibit the entry of new carriers into that market.

**I. THE COMMISSION'S DECISION IS BASED ON SPECULATIVE AND GENERAL ASSESSMENTS, RATHER THAN SPECIFIC SHOWINGS OF PROOF BY THE BELL OPERATING COMPANIES.**

**A. The Commission's Speculative Analysis of Market Power Could Allow the InterLATA Affiliates of Bell Operating Companies to Destroy the Existing Competitive Status of the Long Distance Market.**

The Joint Petitioners respectfully submit that the Commission's Order relies too heavily on speculative and general assessments of the market power of Bell Operating Company interLATA affiliates, in lieu of examining concrete evidence relating to the exercise of market power by individual BOC interLATA affiliates. The Commission broadly concludes that "each of the traditional market factors (excluding bottleneck control) supports a conclusion that the BOC interLATA affiliates will not have the ability to raise price by restricting their output upon entry or soon thereafter."<sup>1</sup> The Commission then launches into a general, nationwide discussion of the effects of entry by BOC interLATA affiliates into the in-region interexchange markets. For example, the Commission admits that the "zero market share" held by each BOC interLATA affiliate will be balanced out by the "brand name identification with customers." *Id.* Other issues addressed by the Commission include, "improper allocation of costs,"<sup>2</sup> "unlawful discrimination,"<sup>3</sup> and the ability

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<sup>1</sup> *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, CC Docket No. 96-149, Second Report and Order, *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Third Report and Order, FCC 97-142, at ¶ 96 (rel. Apr. 18, 1997) ("Order").

<sup>2</sup> *Id.*, at ¶¶ 103-108

<sup>3</sup> *Id.*, at ¶¶ 111-119

of these affiliates to engage in price squeezes.<sup>4</sup>

In none of these sections, however, is there any discussion of factors specific to any individual BOC interLATA affiliate's entry into the market. Instead, the Commission conjectures, "We recognize that action taken in concert by two or more BOCs could have a more significant impact on interLATA competitors, but believe that the antitrust laws and our enforcement process will sufficiently limit the risk of such concerted activity."<sup>5</sup> Similarly, the Commission speculates, "Requiring the BOC interLATA affiliates to file tariffs on advance notice and with cost support data would . . . adversely affect competition."<sup>6</sup> While these conclusions may or may not be true in certain cases, these generalized discussions contain no analysis of whether a particular BOC interLATA affiliate in a particular in-region interexchange market could in fact exercise market power there. Rather than making a comprehensive national assessment based upon theories of how BOC interLATA affiliates will affect the interexchange market, the Commission should examine carefully the impact that each BOC interLATA affiliate will have in its own in-region market, on the basis of specific evidence relevant to that affiliate's ability to exercise market power.

Stunningly, while the Commission concludes on the basis of this speculative analysis that all BOC interLATA affiliates should not be classified as dominant, the Commission simultaneously admits that the exercise of market power by BOC interLATA affiliates could likely lead to smaller competitors being priced out of the market. The level of competition in the interexchange market

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<sup>4</sup> *Id.*, at ¶¶ 125-130

<sup>5</sup> *Id.*, at ¶ 107, n. 295.

<sup>6</sup> *Id.*, at ¶ 89.



has increased in recent years, notwithstanding the presence of AT&T, MCI, and Sprint in that market.<sup>7</sup> Indeed, smaller competitors in the long distance market have grown in both number and size over the past several years, providing consumers with a variety of alternatives to the service of the larger carriers.<sup>8</sup> The Commission should be careful to preserve this competitive balance.

Now, however, the Commission expresses little, if any, concern over the acknowledged fact that unfettered entry of the BOC interLATA affiliates into the in-region, long distance market could drive these smaller competitors from the market. Specifically, the Commission concludes, "It is unlikely . . . that a BOC interLATA affiliate, whose customers are likely to be concentrated in the BOC's local service region, could drive *one or more of these national companies* from the market."<sup>9</sup> The Commission further cites Professor Daniel F. Spulber for the proposition that, "[e]ven in the unlikely event that [a BOC interLATA affiliate] could drive *one of the three large interexchange carriers* into bankruptcy, the fiber-optic transmission capacity of that carrier would remain intact, ready for another firm to buy the capacity at distress sale and immediately undercut the [affiliate's]

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<sup>7</sup> In its Long Distance Market Shares Report, the Commission noted that "[s]maller long distance carriers increased their share of the market [in terms of revenues] six-fold, growing from less than 3% in 1984 to 17% in 1996." *Report on Long Distance Market Shares*, July 1997 ("Report"), at 11. Similarly, the market share in terms of presubscribed lines held by IXC's other than AT&T, MCI, Sprint, and Worldcom has increased from 3.3% in 1987 to 12.1% in 1996. *Report*, at 9, Table 3.

<sup>8</sup> The number of "non-qualifying" smaller carriers has more than doubled, from 204 IXC's in 1991 to 576 in 1996. *Report*, at 5, Table 2. The Commission has estimated that smaller IXC's have experienced a growth in revenue from \$2.9 billion to more than \$5.7 billion over the same period. *Report*, at 13, Table 5.

<sup>9</sup> *Order*, at ¶ 107. (*emphasis added*).

noncompetitive prices.”<sup>10</sup>

The Commission’s analysis erroneously presumes that an oligopoly of four or five large carriers is the equivalent of effective competition. Conspicuously absent from its analysis is any discussion of the effect of this entry on smaller competitors. The Commission cannot simply look at the interexchange market as a combination of three or four nationwide carriers. It must also consider -- and has not done so -- whether smaller long distance carriers with a regional focus will be driven from the interexchange market in the BOC’s home region by the BOC interLATA affiliate’s practices. The Joint Petitioners respectfully request that the Commission revise its analysis of the in-region market power of BOC interLATA affiliates by examining the specific effect that the entry of each affiliate will have on *all* competitors in the in-region, interexchange market. As the Commission has seemingly already admitted, BOC interLATA affiliates may be able to exercise market power to price smaller competitors out of the in-region market, and accordingly, they should be classified as dominant carriers until, as discussed below, these affiliates can demonstrate otherwise.

**B. Even Competitive Local Exchange Carriers Could Be Adversely Affected by the Commission’s Decision.**

The Commission’s decision to declare BOC interLATA affiliates non-dominant in the provision of in-region services could have an impact upon carriers presently outside the long distance market. As BOC interLATA affiliates begin to provide in-region long distance services to

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<sup>10</sup> *Id.* (quoting Daniel F. Spulber, *Deregulating Telecommunications*, 12 Yale J. on Reg. 25, 60 (1995)) (*emphasis added*). Of course, Professor Spulber’s analysis assumes that the BOC interLATA affiliate would not be the purchaser of the fiber-optic capacity at a distress sale. The competitive ramifications of such a purchase are unaddressed in the *Order*.

the BOC's entrenched customer base, CLECs will also face a more difficult challenge in attracting customers for their *local* services. The ability to essentially provide "one-stop shopping" to customers already familiar with the BOC's brand name will make it more likely that customers will choose to remain with their singular BOC service provider than switch to a CLEC that does not offer long distance services on its own or through an affiliated entity as well. The BOC's entrenched customer base and brand name identification will provide the interLATA affiliate with significant benefits, and the presence of the BOC interLATA affiliate will help to lock the BOC's local customers into place.

In turn, many CLECs will feel compelled to enter the long distance market to provide the same "one-stop shopping" opportunities for potential customers (albeit without the same brand name identification and established customer base). As described above, however, entry into the long distance market will be increasingly difficult as the BOC interLATA affiliate has the ability and the incentive to drive smaller competitors from the interexchange market. If the Commission acknowledges that smaller IXCs already in the market are likely to be priced out of the market by the BOC interLATA affiliate's entry, the Commission must also consider the effect that such entry will have on carriers who seek to enter the market *after* the BOC interLATA affiliate is already an established presence. The Commission must ensure not only that smaller IXCs will continue to be able to compete on the merits of their service offerings -- it must also ensure that those CLECs and other carriers who wish to enter the long distance market can do so without fear of an improper exercise of market power by the BOC interLATA affiliate.

**C. Because Concerns About the Exercise of Market Power Still Exist, the Commission Should Place the Burden of Proof on the BOC and its Affiliate.**

The Joint Petitioners acknowledge that not all BOC interLATA affiliates may be able to exercise in-region market power in the manner described above. However, the Commission's speculative and general analysis cannot substitute for a detailed examination of all the facts and circumstances surrounding the entry by each BOC interLATA affiliate. In the interests of making a thorough examination and promoting competition in the in-region, interexchange market, the Commission should therefore place the burden of proof on the BOC interLATA affiliate to demonstrate that it does not possess market power in that region. If an affiliate makes a satisfactory showing, after public notice and comment, that it does not possess market power, then the Commission should release the affiliate from dominant carrier regulation. Until then, however, the Commission should continue to regulate the affiliate as a dominant carrier. If it is true, as the Commission seems to conclude, that BOC interLATA affiliates may be able to price smaller competitors out of the market,<sup>11</sup> then the Commission should proceed with greater caution in letting these affiliates into the market in the first instance.

This Commission has previously placed the burden of proof on incumbent local exchange carriers ("ILECs") when it has had a concern about their exercise of market power and the impact of their actions on other carriers. For example, in its *Local Competition Order*, the Commission decided that ILECs should bear the burden of proving that restrictions on resale are not unreasonable, primarily because the Commission believed that "restrictions and conditions [on

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<sup>11</sup> See text accompanying footnotes 9 and 10.

resale] were likely to evidence of an exercise of market power.”<sup>12</sup> Although this case involves entry into the interexchange market by a BOC affiliate, similar concerns exist about the potential for abuse of market power in this case. This Commission has admitted that the BOC interLATA affiliates can exercise some level of market power in the interexchange market such that smaller carriers -- many of whom have survived and even succeeded in gaining market share in competing for customers against the “Big Three” -- could now be squeezed out of the market merely by the addition of a single competitor. Thus, the Commission should proceed cautiously in letting BOC interLATA affiliates compete on an in-region basis, and first ensure that these affiliate carriers are unable to use their market power to force all but the largest competitors out of the market. Success in the long distance market should depend upon the merits of service offerings, not whether a carrier can withstand the anticompetitive practices of a BOC interLATA affiliate.

## **II. THE COMMISSION’S OVER-RELIANCE ON *EX POST* REMEDIES TO RESPOND TO AN IMPROPER EXERCISE OF MARKET POWER IS MISPLACED.**

In finding BOC interLATA affiliates nondominant in the in-region interexchange market, the Commission relies heavily upon private carriers to monitor anticompetitive practices by these BOCs and their affiliates. For example, the Commission concludes that “the statutory and regulatory safeguards [in its *Non-Accounting Safeguards Order*] will prevent a BOC from discriminating to such an extent that its interLATA affiliate would have the ability upon entry or shortly thereafter, to raise the price of in-region, interstate, domestic interLATA services by restricting its output.”<sup>13</sup>

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<sup>12</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd 15499, 15965-66, at ¶¶ 936-939.

<sup>13</sup> *Order*, at ¶ 119 (citing *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149,

The Commission claims that the expedited Section 271(d)(6) complaint process established in its *Non-Accounting Safeguards Order* “will allow us to adjudicate complaints against the BOCs and the BOC interLATA affiliates in a timely manner.”<sup>14</sup> Similarly, in response to concerns that BOCs and their interLATA affiliates could engage in predatory behavior, the Commission replies that such behavior “could be adequately addressed through our complaint process and enforcement of the antitrust laws, coupled with the biennial audits required by Section 272(d).”<sup>15</sup>

The Commission’s reliance on these *ex post* remedies mistakenly assumes that competitive providers can withstand anticompetitive behavior by the BOCs and their interLATA affiliates while an attempt is made to prove that remedial action is necessary. Smaller carriers have shown the ability to compete successfully in the current interexchange market, but some of these companies may not be able to sustain their operations in the face of predatory behavior by a BOC and its interLATA affiliate. Furthermore, many of these companies do not possess the resources to prosecute claims against those BOCs and BOC affiliates that are engaging in anticompetitive behavior, undermining the Commission’s hope that complaints by private carriers will lead to necessary enforcement of the Commission’s safeguards and the antitrust laws. As the Commission has noted, its competitive safeguards “are effective only to the extent that they are enforced.”<sup>16</sup> The

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First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-489 (rel. Dec. 24, 1996); *recon. pending; petition for review pending sub. nom., Bell Atlantic v. FCC*, No. 97-106 (D.C. Cir. filed Jan. 31, 1997); *vacated and remanded in part* (Mar. 31, 1997); *petition for review pending sub. nom., SBC Communications v. FCC*, No. 97-118 (D.C. Cir. filed Mar. 6, 1997)).

<sup>14</sup> *Order*, at ¶ 118.

<sup>15</sup> *Id.*, at ¶ 128

<sup>16</sup> *Id.*, at ¶ 117.

Commission should therefore ensure that true competition -- competition among all sizes of carriers -- is preserved in the interexchange market by treating BOC interLATA affiliates as dominant carriers until those carriers can demonstrate with specificity that this competitive balance will not be upset by an improper exercise of market power.

### **III. THE COMMISSION MUST CLARIFY HOW ITS REVISED GEOGRAPHIC MARKET DEFINITION IS BASED UPON THE 1992 MERGER GUIDELINES.**

Finally, the Joint Petitioners request that the Commission clarify the revisions it is making to its relevant market definitions. The Commission's analysis in the order begins with the determination that "the *1992 Merger Guidelines* provide an appropriate analytical framework for defining relevant markets in order to assess market power in the interstate, domestic, long distance market."<sup>17</sup> The Commission continues by claiming that it is revising its definitions of product and geographic markets to reflect the *1992 Merger Guidelines* approach to defining relevant markets.<sup>18</sup> Specifically, the Commission decides that its new definition of relevant markets should be "based solely on demand substitutability considerations."<sup>19</sup>

The Joint Petitioners request that the Commission clarify that it is adopting the approach of the *1992 Merger Guidelines* in revising both the product and geographic market definitions. While the discussion of the revised product market definition explicitly notes that the Commission "will rely exclusively on demand considerations,"<sup>20</sup> the Commission's discussion of relevant geographic

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<sup>17</sup> *Id.*, at ¶ 25.

<sup>18</sup> *Id.*, at ¶¶ 40, 64.

<sup>19</sup> *Id.*, at ¶ 27.

<sup>20</sup> *Id.*, at ¶ 41.

markets does not identify how supply substitutability has been removed from consideration.<sup>21</sup> Instead, the Commission states that it will revise its definition of geographic market “as a point-to-point market, rather than as a single national market.”<sup>22</sup> It is unclear how this revised definition eliminates supply substitutability as a factor in determining a relevant geographic market, as is the case in the *1992 Merger Guidelines*. The Joint Petitioners therefore ask that the Commission clarify that it is adopting the *1992 Merger Guidelines* approach -- and eliminating any consideration of supply substitutability -- in defining both geographic and product markets.

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<sup>21</sup> *Id.*, at ¶¶ 64-69.

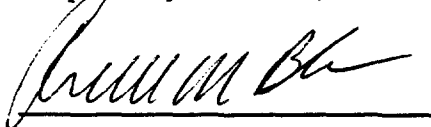
<sup>22</sup> *Id.*, at ¶ 65.



#### IV. CONCLUSION

For the foregoing reasons, the Joint Petitioners respectfully request that the Commission reconsider its determination that BOC interLATA affiliates will be treated as non-dominant carriers in the provision of in-region, long distance services. In lieu of its reliance on speculative assessments of market power and *ex post* remedies for improper exercises of market power, the Commission should regulate each BOC interLATA affiliate as a dominant carrier until it can make a satisfactory showing that it cannot engage in anticompetitive behavior that will price competitors out of the market. In addition, the Joint Petitioners request that the Commission clarify how its revised relevant market definitions are based upon the *1992 Merger Guidelines*.

Respectfully submitted,



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